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No. 07-1033

IN THE
SUPREME COURT OF THE UNITED STATES

CHEMTALL INCORPORATED, ET AL.,
Petitioners,

v.

WILLIAM K. STERN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF *AMICI CURIAE* AMERICAN CHEMISTRY COUNCIL, AMERICAN TORT REFORM ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations that represent businesses that often find themselves targeted in civil actions seeking punitive damages. For this reason, *amici* have a substantial interest in ensuring that punitive damages trials are conducted in a manner that is fair and consistent with due process safeguards. As we will explain, the West Virginia trial court's plan here to decide punitive damages violates these core principles.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

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[1] No counsel for either party has authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel have made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief; their letters of consent have been lodged with the Clerk of the Court.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

STATEMENT OF THE CASE

Amici adopt Petitioners' statement of the case.

SUMMARY OF ARGUMENT

The subject Petition presents the Court with an opportunity to consider whether a trial court may put the "cart before the horse" and determine a defendant's liability for punitive damages before basic issues of compensatory liability and damages have been decided.

The West Virginia trial court plan at issue would permit a jury to determine Petitioners' liability for punitive damages and set a punitive damages "multiplier" prior to class certification, before a full determination of the Petitioners' liability for medical monitoring, and before any medical monitoring damages have been determined. The trial plan conflicts with this Court's recent decisions relating to punitive damages procedural due process protections. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 583 U.S. 408 (2003), and *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), emphasize that pun-

ishment must focus on the defendant's conduct toward the plaintiff, may be imposed only after a defendant has had a full opportunity to defend against the charge, and should only be imposed when the plaintiff's proven compensatory damages are insufficient to serve the state's objectives of deterrence and punishment. Determination of whether, and to what extent, punitive damages may be awarded cannot occur in a vacuum, unanchored to any actual class that has been shown to be eligible for medical monitoring, and before determination of the amount of any recovery.

Moreover, the "reverse bifurcation" approach to punitive damages trials places civil defendants (particularly out-of-state corporations) at substantial risk that they will be arbitrarily deprived of their property. The West Virginia approach appears intended to wield a heavy club to pressure defendants to settle mass tort claims. Defendants will find it virtually impossible to receive a fair trial once the jury considers issues relevant to punitive damages in the first phase of a bifurcated trial. The evidence presented will inevitable serve to taint any verdict that is subsequently rendered. Given the potential for a forced settlement, it is important for this Court to grant the subject Petition and review the trial court's plan at this stage.

The brief does not repeat the Petitioners' arguments. Rather, the brief begins by considering the policy and jurisprudence of this Court relating to procedural due process protections for civil defendants, and the incongruous effect of any trial plan that proposes to determine punitive damages before the essential elements of a case. The brief then ex-

amines the concerns expressed by courts in dealing with "reverse bifurcation" procedures. The brief concludes that if the trial court's plan is left to stand, the use of the litigation tactic will be implemented with increasing frequency to the severe prejudice and detriment of civil defendants. Indeed, the issue is the subject of another petition for certiorari that is pending before this Court. *See Philip Morris USA Inc. v. Accord*, No. 07-806 (petition filed Dec. 17, 2007). Accordingly, *amici* urge this Court to grant certiorari.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIO-RARI AND CLARIFY THAT "REVERSE BIFURCATION" IN PUNITIVE DAMAGES TRIALS VIOLATES DUE PROCESS

Plaintiffs-Respondents seek medical monitoring for conditions they claim may develop because of their exposure to products used to treat coal wash water at coal preparation plants. They also seek punitive damages. The trial court adopted a "reverse bifurcation" plan in which punitive damages would be determined before a full determination of compensatory liability and damages.

In the first phase, the jury would consider whether a defendant's conduct warrants punitive damages as well as specific liability issues suggested by Plaintiffs. If the jury determines that the defendant's conduct justifies imposition of punitive damages, then the jury may set a "multiplier" that the court would later apply to any medical monitoring recovery. Not until the second phase of the trial would the court and jury consider the merits of the

case, including class certification and liability for medical monitoring.

Determining punitive damages before liability raises serious constitutional issues. As explained below, this Court should take this opportunity to hold that the trial plan contravenes due process safeguards in the United States Constitution that protect civil defendants from the arbitrary imposition of punishment.

A. Applicability of this Court's Procedural Due Process Safeguards to Reverse Bifurcation in Punitive Damages Trials

This Court has repeatedly emphasized the importance of procedural protections for defendants as essential to sustaining a punitive damage award. *See Williams*, 127 S. Ct. at 1065 (finding that jury instruction did not properly cabin jury discretion and led to arbitrary punishment); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2002) (holding that review of punitive damage award must be *de novo*); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420-21 (1994) (finding unconstitutional the limited authority of Oregon appellate courts to review punitive damages awards). The Court has recognized that unlimited judicial or jury discretion "may invite extreme results that jar one's constitutional sensibilities." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1990). This case presents an opportunity for this Court to clarify that a reverse punitive damage bifurcation procedure, such as that used by the West Virginia trial court, runs afoul of this jurisprudence.

As this Court has emphasized in determining whether a court's method of calculating punitive damages violates due process, a benchmark is whether the court's plan departs from traditional procedures. *See Oberg*, 512 U.S. at 421. "When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.* at 430. The adequacy of procedural protections is particularly important with respect to punitive damages because such awards "pose an acute danger of arbitrary deprivation of property" and come with "the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Id.* at 432.

In this case, the trial court's reverse bifurcation approach to decide punitive damages – which the West Virginia courts view as "creative, innovative" trial management, *see In re Tobacco Litig.*, 624 S.E.2d 738, 739 n.1 (W. Va. 2005) – is assuredly not a time-tested common law procedure. Instead, the trial court's plan places a defendant at great risk of an arbitrary result. If permitted to stand, such a procedure could become commonplace. This Court should grant certiorari to address this atypical and unfair practice.

B. The Trial Court's Reverse Bifurcation Plan Runs Afoul of this Court's Mandate that Punitive Damages Awards Must Reflect the Harm to the Individual Before the Court and the Conduct at Issue

A theme of this Court's recent jurisprudence is that punitive damages may only be imposed to pun-

ish a defendant for conduct directed toward those before the court, and the harm to those parties. *See Williams,* 127 S. Ct. at 1063; *Campbell,* 538 U.S. at 422-23. This Court could not be more clear on this point than in its recent decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). In that case, a lawsuit for negligence and deceit brought by the widow of a smoker, an Oregon court refused to instruct the jury that it could not punish the defendant for injuries to persons not before the court. The result, a $79.5 million punitive damage award, was reduced by the trial court to $32 million, but fully reinstated by the intermediate appellate court. *See* 127 S. Ct. at 1061-62. In vacating the award, this Court did not consider the excessiveness of the punitive damage award, but focused its inquiry on whether the procedures used were sufficient to avoid an arbitrary result. *See id.* at 1062-63. The basis of the Court's finding that punitive damages cannot be awarded based on harm to "strangers in the litigation," is salient in this case:

> For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing an individual with an opportunity to present every available defense. Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing . . . that the other victim was not entitled to damages. . . .
>
> For another, to permit punishment for injuring a nonparty victim would add a near standardless dimension to the pu-

> nitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur? The trial will not likely answer such questions as to nonparty victims. The jury will be left to speculate. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice—will be magnified.
>
> Finally, we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*.

Id. at 1063 (internal quotations and citations omitted).

Where, as here, a jury is to consider punitive damages before certification of the class, and before a full determination of liability and damages, the defendant would not have "an opportunity to present every available defense" before such a decision is made. Moreover, consideration of punitive damages before class certification would appear to leave the same crucial questions unanswered as in *Williams*: how many victims are there, how serious are their injuries, and how did their injuries occur? *Williams*

does not permit a jury to decide whether a defendant's conduct warrants punitive damages, and the appropriate amount or multiplier for such damages, in the absence of answers to these questions.

This Court's earlier decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), further illustrates the need for a punitive damage determination to focus on the defendant's conduct directed toward the individual or individuals before the court. In *Campbell*, the Court ruled that the Utah Supreme Court erred in finding that State Farm's nationwide policies, rather than the conduct directed toward the plaintiffs, could support a punitive damage award. *See id.* at 420. While the Court's decision was rooted in a violation of principles of federalism that would effectively allow a local court in one state to set regulatory policy in a sister state, "a more fundamental reason" for its invalidation of the award was the lack of a nexus between the punishment and the Campbells' harm. *Id.* at 422. The Court held:

> A defendant's dissimilar acts, independent from the acts upon which liability is premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit the courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant in the guise of the reprehensibility analysis, but we have no doubt the Utah

> Supreme Court did that here. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Id. at 422-23; *see also Haslip,* 499 U.S. at 18-20 (instructing that punitive damage awards must take into consideration "the character and degree of the wrong shown by the evidence" and be based on "a meaningful *individualized* assessment of appropriate deterrence and retribution") (emphasis added).

The trial plan at issue, however, would have a jury reach a punitive damage "multiplier" before knowing who is before the court, the extent of harm they experienced, and whether the defendants are responsible for their claims. It is similar to the "hypothetical claim" that this Court found impermissible in *Campbell.* In granting certiorari, this Court would have an opportunity to clarify that a punitive damage award cannot satisfy due process where the award is decided before knowing the identity of the plaintiffs, what conduct the defendant directed at those plaintiffs, the level of reprehensibility of the conduct toward those plaintiffs, and the degree of harm they sustained.

C. The Trial Court's Plan to Set a Punitive Damages "Multiplier" in a Vacuum is Arbitrary and Should be Declared Unconstitutional

Determination of whether, and to what extent, punitive damages may be awarded cannot occur in a

vacuum, unanchored to any claim that has been shown to be eligible for damages, and before determination of the amount of any recovery. As this Court has repeatedly found, punitive damages can only be awarded to punish a defendant for harm to those before the court, and the punishment must be proportional to the offense. *See Williams*, 127 S. Ct. at 1063; *Campbell*, 538 U.S. at 422.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court outlined its now well known three-prong test for reviewing punitive damages. This test considers (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *See id.* at 575. Without a determination of liability or the extent of compensatory damages before deciding punitive damages, the third prong of this test fails on its face. When a court enters a reverse punitive damages bifurcation plan, there is no way a jury can non-arbitrarily determine a proportional amount, or a multiplier as in the present case, without first knowing the extent of the alleged harm at issue. There is simply no basis for comparison because the degree and extent of civil liability are unknown.

As this Court further recognized in *Gore*, the ratio between punitive damages and the actual harm inflicted on the plaintiff "[is] perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award." *Id.* at 580. The Court's consistent refusal to adopt a "bright line" test for de-

termining the constitutional propriety of the ratio between punitive damages and the actual or even potential damage to the plaintiff reaffirms the need for the fact finder to determine liability and economic damages before considering punitive damages. *See id.* at 582-83. Instead of a mathematical formula, this Court has provided specific guidance to courts for evaluating the excessiveness of punitive damages that greatly exceed compensatory damages. The constitutionally permissible size of the ratio varies based on the reprehensibility of the conduct and harm to the particular individual or individuals before the court.

For instance, in ordinary cases, a punitive damage award of four times compensatory damages "may be close to the line" of constitutional permissibility. *Haslip,* 499 U.S. at 23. In some cases, the Court has suggested that low awards of compensatory damages may justify a higher ratio if the act is particularly egregious, results in a small amount of economic damages, or the monetary value of the harm is difficult to measure. *See Gore,* 517 U.S. at 582. On the other hand, a substantial compensatory award, which may itself include a punitive element, may permit no more than a 1:1 ratio between punitive and compensatory damages. *See Campbell,* 538 U.S. at 424-26.

Granting certiorari here would give the Court the opportunity to hold that these constitutional principles cannot be satisfied where a jury determines a punitive damages amount or a multiplier before knowing the economic damages incurred by the plaintiffs. A court reviewing a punitive damages award focusing on the ratio of compensatory to puni-

tive damages cannot even begin its thought process if there is no determination of compensatory damages from which to begin. Such a process makes a sham of the *Leatherman* Court's holding that the fundamentals of procedural due process have a meaningful *de novo* review and whether a lower court properly applied this Court's three prong test as to whether an award was constitutional.[2]

II. DEFENDANTS ARE UNABLE TO RECEIVE A FAIR TRIAL WHEN PUNITIVE DAMAGES ARE DETERMINED BEFORE COMPENSATORY LIABILITY AND DAMAGES

A. The Trial Court's Plan is Intended to Maximize, Rather Than Minimize, the Likelihood of Bias and Prejudice

Typically in an ordinary bifurcated trial, juries determine punitive damages issues only *after* compensatory liability and damages have been determined. This procedure prevents evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability. Such evidence may include inflammatory documents or the net worth of the defendant. While juries may be instructed to ignore such evidence in determining liability, it is difficult, as a practical

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[2] This Court's decision in *Oberg* established a requirement for meaningful appellate review of punitive damages determinations. *See Oberg*, 512 U.S. at 421. The Court built on this requirement in *Leatherman*, holding that appellate *de novo* review of punitive damages awards was necessary to comport with constitutional due process. *See Leatherman*, 512 U.S. at 443.

matter, for jurors to do so. By deferring consideration of evidence relevant only to punitive damages, the standard approach to a bifurcated punitive damages trial is intended to limit the potential for bias. *See* Victor E. Schwartz *et al.*, *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brook. L. Rev. 1003, 1018-19 (1999).

This "straight bifurcation" procedure is the precise opposite of the unusual approach adopted in the trial court here. The trial court's plan is clearly intended to maximize, rather than minimize, the likelihood of bias and prejudice. It jeopardizes the due process right of Defendants-Petitioners to a fair trial.

In some complex cases, courts have even trifurcated trials – allowing the jury to first decide compensatory liability and damages, then punitive damages liability, then the amount of any punitive damages – to further reduce the potential that the jury may improperly consider irrelevant and highly prejudicial evidence. *See, e.g., Webster v. Boyett*, 496 S.E.2d 459, 462-64 (Ga. 1998).

The Supreme Court of Mississippi in *Bradfield v. Schwartz*, 936 So. 2d 931 (Miss. 2006), explained the importance of separating presentation of liability *before* punitive damages. The court recognized, "without an evidentiary buffer at trial, juries will ultimately confuse the basic issue of fault or liability and compensatory damages with the contingent issue of wanton and reckless conduct which may or may not ultimately justify an award of punitive damages." *Id.* at 938. A trial court plan that allows a jury to consider punitive damages at the same time as compensatory liability and damages,

> is a troubling scenario when one considers that under such procedure, not only is the jury subject to possibly returning an inflated compensatory damage award based on consideration of the wrong evidence, it may also forego a finding for the defendant altogether in those situations where the jury may have otherwise seriously considered finding for the defendant, by considering only the appropriate evidence as to fault/liability.

Id.

Many other courts have agreed that evidence related to punitive damages should be removed from the jury's determination of liability and compensatory damages to the "extent humanly possible" to avoid the "taint and suspicion" that would otherwise pervade the verdict. *Campolongo v. Celotex Corp.*, 681 F. Supp. 261, 264 (D. N.J. 1988) (upholding trial court plan in which jury considered strict liability and compensatory damages before negligence claims and punitive damages). Indeed, the majority rule is that the procedure approved in West Virginia is unconstitutional. *See In re Simon II Litig.*, 407 F.3d 125, 138 (2d Cir. 2005); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417-19 (5th Cir. 1998); *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), *cert. denied*, 128 S. Ct. 96 (2007); *Southwestern Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000).

Yet, in this case, the trial plan provides a form of reverse bifurcation proposed by the Plaintiffs that will maximize the potential for jury bias and an ex-

cessive award, rather than minimize it. Granting certiorari in this case provides the Court with an opportunity to consider whether this risk of prejudice rises to the level of a constitutional violation of a defendant's due process rights.

B. Reverse Bifurcation in Punitive Damages Trials May Become More Common Unless the Court Applies its Punitive Damages Jurisprudence to Such Practices

This is not the first instance of the use of such a nontraditional reverse bifurcation procedure that jeopardizes a defendant's due process rights, nor will it be the last – particularly in West Virginia.

A reverse bifurcation plan to permit consideration of punitive damages before a full determination of liability is similar to an approach that was rejected by a Florida appellate court and the Florida Supreme Court in *Engle v. Liggett Group, Inc.*, 853 So. 2d 434 (Fla. Ct. App. 2003), *aff'd*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 128 S. Ct. 96 (2007). *Engle* involved a class action composed of all Florida smokers seeking damages against cigarette companies and industry organizations for alleged smoking-related injuries. The initial proposed *Engle* trial plan was divided into three phases. In Phase 1, the jury was to consider general issues related to the defendants' conduct and health effects of smoking, reach findings of fact, and determine entitlement to punitive damages for the class as a whole. *See id.* at 441. This trial plan also proposed to allow the jury, after determining entitlement to punitive damages, to then establish a "basis or ratio" for computing punitive damages individually for class members within each

subclass. *See id.* at 441 n.2. In Phase 2, the jury would determine the individual liability and compensatory damages claims, and the punitive "basis or ratio" would be applied to each plaintiff's compensatory award to determine his or her punitive award. *See id.* It was not until after the jury returned its Phase 1 verdict, and before the Phase 2 trial began, that the court abandoned the "basis or ratio" method, which was repeatedly objected to by the defendants. *See id.* Instead, the court determined the jury would assess punitive damages as a lump sum with respect to the entire class.

Under the modified trial plan, the jury, in Phase 2, would consider compensatory damages to three individual class representatives and the amount of punitive damages for the entire class. Phase 3 would involve new juries that would decide individual liability and compensatory damages for the estimated 700,000 class members.[3] The result of the first two phases of the trial was a $145 *billion* punitive damage award for the class before a d termination of individual liability or compensatory damages for all but the three class representatives. *See Engle*, 853 So. 2d at 434.

The appellate court described the plan as putting the "cart before the horse." *See id.* at 450. Relying on the Florida Constitution, the court found it was impermissible to determine class-wide punitive damages before the necessary findings of liability and de-

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[3] The determination of compensatory and punitive awards was conducted in separate stages in Phase 2. *See Engle v. R.J. Reynolds Tobacco Co.*, 122 F. Supp. 2d 1355, 1358 (S.D. Fla. 2000).

termination of compensatory damages because such a plan:

> a) improperly requir[ed] the defendants to pay punitive damages for theoretical injuries to hundreds of thousands of class members, without a determination that defendants are liable for such injuries; b) preclud[ed] the constitutionally required comparison of punitive damages and compensatory damages; and c) eliminat[ed] the jury's discretion to assess punitive damages based upon the individual class members' varying circumstances.

Id. The court also found it improper to decide punitive damages based on a fictional composite – a generalized "perfect plaintiff" – that supplanted all real class members, whose knowledge, conduct, and other circumstances varied, and that allowed the introduction of evidence of years of conduct that was "untethered to any individual plaintiff." *Id.* at 456, 467 n.48.

The Florida Supreme Court unanimously affirmed the appellate court's decision to vacate the punitive damages award. *See Engle*, 945 So. 2d. at 1262. The Florida Supreme Court held, "[a]s a matter of law, the punitive damages award violates due process because there is no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed." *Id.* A majority of the *Engle* court further concluded that the trial court erred in allowing the jury to consider entitlement to punitive damages during Phase 1 of the trial. *See id.* at 1262-63. The court

held that "a finding of liability is required before entitlement to punitive damages can be determined, and that liability is more than a breach of duty." *Id.* at 1262 (citing *Ault v. Lohr*, 538 So. 2d 454, 456 (Fla. 1989)). The *Engle* court recognized that the jury's general findings on certain factual issues and elements of liability were insufficient to support a punitive damage award when the jury had not determined crucial elements of the case, such as whether any of the class members relied upon the defendants' representations or were injured by the defendants' conduct. *See id.* at 1263. In other words, the trial court erred in permitting the jury in Phase 1 to consider punitive damages when that jury "did not determine whether the defendants were liable to anyone." *Id.* at 1263 (quoting *Engle*, 853 So. 2d at 450). This Court denied certiorari. 128 S. Ct. 96 (2007).

Indeed, the issue has arisen yet again in a Petition pending before this Court. In *Philip Morris USA Inc. v. Accord*, No. 07-806 (petition filed Dec. 17, 2007), a mass tort action consolidating over 700 separate personal injury actions brought by individual smokers, a West Virginia court applied a similar reverse bifurcation procedure as in the instant case. In Phase I of that trial, the court would determine punitive damages for each individual defendant's conduct based on aggregate proof, without any nexus to an individual plaintiff. It would then set a punitive damages "multiplier" for that defendant. In Phase II, different fact finders would determine liability and compensatory damages. Then the multiplier would be applied to each plaintiff to determine the amount of punitive damages owed by each defendant to each individual plaintiff.

This type of proceeding, as in the case at bar, is rigged to punish an unpopular corporate defendant without respect to the reprehensibility of its conduct or the amount of harm to any particular plaintiff. In other words, the same multiplier will award each and every plaintiff who receives compensatory damages punitive damages, regardless of why he or she began to smoke, what he or she know about the health risks of smoking, how often he or she smoked, what brand he or she smoked, what advertising or other conduct influenced his or her behavior, and the illness he or she contracted. Such arbitrary punishment is precisely what the Due Process Clause does not permit.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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